Buxton & Anor v Supreme Finance (M) Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-121-90
HARUN HASHIM, MOHAMED YUSOFF AND GUNN CHIT TUAN SCJJ
10 AUGUST 1992

Land Law *— Charge — Order for sale — Whether there exists cause to the contrary — National Land Code 1965 s 256(3)*

Land Law *— Priorities — Land subject to registered charge — Purchaser executed sale and purchase agreement with notice of charge — No consent obtained from chargee before sale to purchaser — Whether purchaser acquired any right or interest in land — Whether chargee's interest has priority — National Land Code 1965 s 340(1) & (2)*

A housing developer, the registered owner of land ('the chargor'), had obtained a loan from a finance company and had charged the land to the finance company ('the respondent'). The chargor sold the apartments built on the land to the purchasers, among whom were the appellants. The appellants had paid the full purchase price for the apartments. As the chargor had failed to repay the loan to the respondent, the latter applied for an order for sale of the land ('the application'). In the application the respondent excluded some apartments, but not the apartments of the appellants. No written consent of the respondent had been obtained in respect of the sale of the apartments to the appellants. The appellants were granted leave to intervene in the application but the appellant's objections were dismissed and the court ordered the sale of the property. The appellants appealed. The appellants contended that they were entitled to succeed as the circumstances showed cause to the contrary under s 256(3) of the National Land Code 1965 ('the Code').

Held, dismissing the appeal:

(1) As no written consent was obtained by the chargor from the chargee (respondent) before the sale of the apartments in question to the appellants pursuant to cl 13 of the annexure to the charge, it could not confer any right or interest in the appellants against the respondent. Even if the final payments made by the appellants for the apartments were paid to the respondent, that did not make them a constructive trustee of the appellants as they did not know part of the moneys came from the appellants. In any event, there was no evidence that the moneys paid by the appellants to the chargor were paid over to the respondent.

(2) In this case the appellants had executed the sale and purchase agreements with notice of the charge and they must accept the purchase subject to the registered charge. They should have protected their interests with a caveat or entered into a tripartite agreement with the chargor and respondent to make direct payments to the respondent as did the purchasers of the other apart-

ments which were excluded from the sale. The appellants had not satisfied the court of the existence of cause to the contrary to justify withholding an order for sale at the instance of the registered chargee, the respondent.

Per curiam: The interest of a registered chargee is indefeasible by s 340(1) of the Code unless it is made defeasible by s 340(2). The indefeasibility of the chargee's interest is not affected by the chargor's conduct, however unconscionable or deceitful it may be, unless it can be shown that there was collusion between the chargor and the chargee to defeat the interest of a third party. The interest of a bona fide purchaser for value cannot prevail over that of a registered chargee.

[Bahasa Malaysia summary

Sesuatu pemaju perumahan, tuan punya berdaftar sekeping tanah ('penggadai'), telah mendapat pinjaman dari suatu syarikat kewangan dan telah menggadai tanahnya kepada syarikat kewangan itu ('penentang'). Penggadai telah menjual pangsapuri yang dibina atas tanah itu kepada pembeli, antaranya adalah perayu. Perayu telah membayar semua harga pembelian pangsapuri itu. Oleh kerana penggadai gagal membayar balik hutang kepada penentang, penentang telah memohon mendapat perintah penjualan tanah itu ('permohonan itu'). Di dalam permohonan itu, penentang tidak memasukkan beberapa pangsapuri, tetapi pangsapuri perayu telah dimasukkan. Tiada keizinan bertulis penentang telah diperolehi berkenaan dengan penjualan pangsapuri itu kepada perayu. Perayu telah diberi kebenaran untuk mencelah dalam permohonan itu tetapi bantahan mereka telah ditolak dan mahkamah telah memerintahkan penjualan tanah itu. Perayu telah membuat rayuan. Perayu berhujah bahawa mereka berhak berjaya kerana keadaan yang ada menunjukkan sebab sebaliknya (cause to the contrary) di bawah s 256(3) Kanun Tanah Negara 1965 ('Kanun itu').

Diputuskan, menolak rayuan itu:

(1) Kerana tiada keizinin bertulis telah diperolehi oleh penggadai daripada pemegang gadaian (penentang) sebelum penjualan pangsapuri berkenaan kepada perayu mengikut fasal 13 dalam tambahan kepada gadaian itu, ia tidak boleh memberi sebarang hak atau kepentingan kepada perayu terhadap penentang. Walaupun pembayaran terakhir yang dibuat oleh perayu bagi pangsapuri itu telah dibayar kepada penentang, itu tidak menjadikan mereka pemegang amanah konstruktif perayu kerana mereka tidak tahu sebahagian wang itu adalah daripada perayu. Bagaimanapun, tidak terdapat keterangan bahawa wang yang dibayar oleh perayu kepada penggadai telah dibayar kepada penentang.

(2) Di dalam kes ini perayu telah menyempurnakan perjanjian jualbeli itu dengan notis gadaian itu dan mereka mesti terima pembelian itu tertakluk kepada gadaian yang berdaftar itu. Mereka

seharusnya melindungi kepentingan mereka dengan suatu kaveat atau mengikat perjanjian tiga pihak dengan penggadai dan penentang untuk membuat pembayaran terus kepada penentang seperti yang telah dilakukan oleh pembeli pangsapuri yang lain yang tidak dimasukkan dalam penjualan itu. Perayu telah gagal memuaskan hati mahkamah tentang adanya sebab sebaliknya untuk dijadikan alasan enggan memberikan perintah penjualan atas permohonan pemegang gadaian berdaftar, iaitu penentang.

Per curiam: Kepentingan seseorang pemegang gadaian berdaftar tidak boleh disangkal mengikut s 340(1) Kanun itu kecuali ia dijadikan boleh disangkal mengikut s 340(2). Ketakbersangkalan kepentingan pemegang gadaian tidak dijejas oleh kelakuan penggadai, walaubagaimana tidak berpatutan atau memperdayakan sekalipun, kecuali boleh ditunjukkan bahawa terdapat pakat-sulit antara penggadai dan pemegang gadaian untuk mengalahkan kepentingan suatu pihak ketiga. Kepentingan seseorang pembeli bona fide dengan nilai tidak boleh mengatasi kepentingan seseorang pemegang gadaian berdaftar.

Cases referred to

1 *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457 (folld)
2 *Clayton's Case* (1816) 1 Mer 572; [1814 – 23] All ER Rep 1; 35 ER 781 (refd)
3 *Florence Deeley v Lloyds Bank Ltd* [1912] AC 756 (refd)
4 *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81 (folld)
5 *Perwira Habib Bank (M) Bhd v Bank Bumiputra (M) Bhd* [1988] 3 MLJ 54 (folld)
6 *Perwira Habib Bank (M) Bhd v Oon Seng Development Sdn Bhd* [1990] 1 MLJ 447 (folld)

Legislation referred to

National Land Code 1965 ss 256(3), 340(1), (2)

Appeal from: Originating Summons No F31–3899–1986 (High Court, Kuala Lumpur)

G Sri Ram (*Grace Dhillon* with him) (*Dhillon & Co*) for the appellants.
Fong Ah Kok (*Chan Kah Hong* with him) (*Khaw & Hussain*) for the respondent.

Cur Adv Vult

Harun Hashim SCJ (delivering the judgment of the court): Chandan Daya Sdn Bhd ('Chandan Daya'), a housing developer, is the registered owner of land Lot 55 Section 95 held under CT 11533 Bandar Kuala Lumpur. In 1981, Chandan Daya obtained a loan of $2.2m from Keng Soon Finance Bhd and charged the land to the latter as security for the loan on 28 November 1981 which was registered on 19 April 1982. Chandan

Daya then constructed a building on the land consisting of 16 units of apartments.

In 1984 Chandan Daya sold the units to several purchasers who each executed a sale and purchase agreement with Chandan Daya.

James Edward Buxton and Elizabeth Buxton jointly purchased Apartment 2A on 26 June 1984 and Elsa Constance Radcliffe purchased Apartment 2B on 30 August 1984. Four other purchasers obtained end-financing from Supreme Finance Bhd (who by then had succeeded Keng Soon Finance Bhd) in respect of the purchases of Apartments 5A, 5B, 8A and 8B. James Edward Buxton (the first appellant) applied for a similar loan from Supreme Finance but was turned down. He assigned his rights in Apartment 2A to Peggy Mavis Moreira nee Leembruggen (the second appellant). Radcliffe has since died and the first appellant is the executor of the deceased's estate in respect of Apartment 2B. The full purchase price of $205,000 for each of the Apartments 2A and 2B have been paid to Chandan Daya. The estate of Radcliffe is in occupation of Apartment 2B through a tenant. The second appellant is in personal occupation of Apartment 2A.

Chandan Daya ('the chargor') failed to repay the loan with accrued interests despite three extensions of the period for repayment. The last date for settling the loan and interest was 13 May 1985. As a result, Supreme Finance Bhd (the respondent) through their solicitors, issued the statutory notice in Form 16D under s 254 of the National Land Code 1965 ('the Code') on 2 September 1986 to remedy the breach within 14 days of the receipt of the said notice failing which the respondent would apply for an order of sale. The chargor neglected to remedy the breach specified in the statutory notice. The respondent then took out an originating summons on 26 November 1986 for an order to sell the land by public auction together with the apartment building thereon under s 256 of the Code. At the time of the application, the outstanding sum secured by the charge was $2,006,297.58 with further interest thereon at an additional daily rate of $921.41 or 20% pa from 7 August 1986.

In the application for the order for sale, the respondent excluded Apartments 5A, 5B, 8A and 8B. The application did not exclude Apartments 2A and 2B. So the appellants applied by summons-in-chambers on 28 April 1987 to intervene in the proceedings. The court granted leave to intervene and defend the originating summons on 9 July 1987. The learned judge on 14 February 1990 dismissed the appellants' objections and ordered the sale of the property. Hence this appeal.

Section 340 of the Code (so far as material) provides:

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible —

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

It is not the appellants' case that the charge in the respondent's favour is invalid and therefore defeasible under s 340(2). They contend, however, that all they are required to do is to show *cause to the contrary* under s 256(3) so as to exclude Apartments 2A and 2B from the order for sale. That subsection reads:

> On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

The springboard of the appellants' contention that they have shown cause to the contrary in the instant case is the passage in the case of *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor*[1] where at p 460 Lord Oliver in the Privy Council said:

> Section 256(3) of the National Land Code is mandatory. The court 'shall' order a sale unless it is satisfied of the existence of 'cause to the contrary'. Granted that these words have been construed in Malaysia as justifying the withholding of an order where to make one would be *contrary to some rule of law or equity*, they clearly cannot extend to enabling the court to refuse relief simply because it feels sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly. (Emphasis supplied.)

The appellants say the following circumstances constitute cause to the contrary. Firstly, by cl 30 of the annexure to the charge, the respondent were under a duty to maintain a separate account into which all moneys paid by the purchasers of the apartments, including that of the appellants, were paid to the credit of such purchasers. It is said that such payments were not moneys to be used in the repayment of the debt of the chargor under the charge. And since the appellants have paid the purchase price of their apartments in full, they were entitled to an *equitable estate* in the land which binds the conscience of the respondent, obliging it to exclude the appellants' apartments from the order for sale. Clause 30 is in the following terms:

> Procedure on notice of further charge.
>
> It is hereby agreed that if the chargor(s) (or any one or more of them) shall execute or create any further or subsequent charge mortgage or incumbrance over the said land hereby charged or any part or parts thereof in favour of any other corporation person or persons of which the lender shall receive notice either actual or constructive the lender may on receiving such notice forthwith open a new or separate account with the chargor(s) in its books and if the lender does not in fact open such new or separate account the lender shall nevertheless be deemed to have done as at the time when the lender received or was deemed to have received such notice (hereinafter called 'time of notice') and as from and after the time of notice all payments in account made by the chargor(s) (or any one or more of them) to the lender shall (notwithstanding any legal or equitable rule of presumption to the contrary) be placed or deemed to have been placed to the credit of the new or separate account so opened or deemed to have been

opened as aforesaid and shall not go in reduction of the amount due by the chargor(s) to the lender at the time of notice. Provided always that nothing in this clause contained shall prejudice the security which the lender otherwise would have had hereunder for the payment of the moneys costs charges and expenses herein this charge referred to notwithstanding that the same may become due or owing or be incurred after the time of notice.

We are of the view that cl 30 does not apply for the simple reason that there has been no further or subsequent charge to the charge the subject matter of this appeal. Nor does a sale and purchase agreement executed between the appellants and the respondent make it an *incumbrance* over the land in the nature of a legal interest in the land equivalent to that of a charge intended in that clause, applying the ejusdem generis rule of interpretation. The question whether an equitable interest in land is created does not therefore arise under this clause. In any event cl 30 is an accounting device to avoid the operation of the rule in *Clayton's Case*[2] which provides that where there are several debts, moneys received by a creditor shall be utilized in repayment of the oldest debt or earliest advance released to a debtor under a debt account. By cl 30 a line is drawn to separate the payments in respect of each charge in order to maintain priority of the respective security: see also *Florence Deeley v Lloyds Bank Ltd.*[3]

On the face of the charge documents, the respondent is under no duty to enquire where the moneys paid into the single account of the chargor came from. It is true that the purpose of the loan was to construct the apartment block on the land and to sell the units to individual purchasers, the income from which would go towards repayment of the loan. With solicitors advising the parties in drawing up the charge documents, it would have been a simple matter to make provisions for the purchasers to pay direct to the respondent and not the chargor. Such a provision in itself would be an added security for the loan. It is clear, however, that this was not the arrangement between the parties and it is too late in the day for the appellants to assert that this was the implied arrangement by the ingenious application of cl 30.

Next, it was argued that by cl 13 of the annexure to the charge, the chargor had obtained the prior consent of the respondent for the sale of the apartments. Clause 13 provided:

Dealings with land

The chargor(s) will not transfer said charge or otherwise howsoever deal with the said land or any part thereof or any interest therein or make the same subject to any burden charge encumbrance liability or lien whatsoever or make any application for the alteration of the category of land use or for the imposition of any fresh category of land use in respect of the said land or for rescission removal or amendment of any condition or restriction affecting the said land without the written consent of the lender first had and obtained.

No such written consent was obtained in respect of Apartments 2A and 2B. It is said, however, that as the same solicitors acted for the respondent and the chargor in respect of the charge and for the appellants and the chargor in respect of the sale and purchase agreements, that knowledge is imputed to the respondent. Further, the respondent had knowledge that the appel-

A lants had paid in full the purchase price of the apartments because in 1985 the chargor made substantial payments to the respondent. In reliance on these facts it is contended that the chargor was a bare trustee of the apartments for the appellants who are the true beneficial owners. The respondent had knowledge or means of knowledge of that trust and was in
B possession of the moneys paid by the beneficiary under the trust. Under these circumstances, it was unconscionable for the respondent to move for the sale of the apartments in question.

We are unable to accept this contention. As no written consent was obtained by the chargor before the sale of Apartments 2A and 2B to the appellants, it cannot confer any rights or interests in the appellants against
C the respondent. The appellants had made the final payments for their apartments on 30 October 1984 but even if such moneys were paid to the respondent, it does not make them a constructive trustee of the appellants. They just did not know that part of the moneys had come from the appellants. In any event there was no evidence that the moneys paid by the appellants to the chargor were paid over to the respondent.

D Now s 2.02 of the sale and purchase agreements executed by the appellants states:

> The said land is charged to Supreme Finance (M) Bhd of Supreme Finance Centre of 120, Jalan Pudu, Kuala Lumpur as security for loan facilities granted to the vendor.

E The issue as to the rights of an innocent purchaser for value, with or without notice of the charge as against a registered chargee has been considered by the courts and is now settled law: see eg *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors*;[4] *Perwira Habib Bank (M) Bhd v Bank Bumiputra (M) Bhd*;[5] *Perwira Habib Bank (M) Bhd v Oon Seng Development*
F *Sdn Bhd*.[6] In all these cases, it was held that the interest of a registered chargee is indefeasible by s 340(1) of the Code unless it is made defeasible by s 340(2). The indefeasibility of the chargee's interest is not affected by the chargor's conduct, however unconscionable or deceitful it may be, unless it can be shown that there was collusion between the chargor and the
G chargee to defeat the interest of a third party. The interest of a bona fide purchaser for value cannot prevail over that of a registered chargee. As was said by Lord Oliver in *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor*[1] at p 460:

> Even assuming — a point which does not arise in the instant case and has not been argued — that this section [340 of the Code] might not protect a purchaser
H or chargee acquiring title with actual notice of the equitable interest of a purchaser, their Lordships are quite unable to see how the interest of a purchaser who has expressly consented to the creation of the chargee's interest could prevail over the registered title. Nor, in their Lordships' opinion, could it furnish 'a cause to the contrary' for the purposes of s 256.

I In the present case, the appellants accept the indefeasible title of the respondent. They executed the sale and purchase agreements with notice of the charge and they must accept the purchase subject to the registered charge. They should have protected their interests with a caveat or entered into a tripartite agreement with the chargor and the respondent to make

direct payments to the respondent as did the purchasers of Apartments 5A, 5B, 8A and 8B. We sympathize with their plight but we must hold that in the circumstances of this case they have not satisfied the court of the existence of cause to the contrary to justify withholding an order for sale at the instance of the registered chargee respondent.

We agree with the finding of the learned judge and accordingly would dismiss this appeal with costs. The respondent is to take out a fresh summons-for-directions in the High Court to fix the date of sale, reserve price and other directions. Deposit to be paid to the respondent to account of taxed costs.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim